Supreme Court, U. S.
JUL 29 1974
JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM

No. 73-1500

DON R. ERICKSON, Warden
South Dakota State Penitentiary, Petitioner,

v.

United States of America ex rel.
JOHN LEE FEATHER, Respondent,
United States of America ex rel.
LAVERNE BLACK THUNDER, Respondent,
United States of America ex rel.
AMBROSE ST. JOHN, Respondent,
United States of America ex rel.
JAMES R. KEEBLE, Respondent,
United States of America ex rel.
CURTIS SMALL, Respondent,
United States of America ex rel.
ROMAN V. DERBY, Respondent,
United States of America ex rel.
JOSEPH DAY, Respondent,
United States of America ex rel.
ARNOLD LAFROMBOISE, Respondent,
United States of America ex rel.
CLARENCE WALKER, Respondent,
United States of America ex rel.
THEODORE DUANE WYNDE, Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 8, 1974
CERTIORARI GRANTED JUNE 3, 1974

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(The decision of the United States Court of Appeals for the Eighth Circuit in United States ex rel. Feather v. Erickson, 489 F.2d 99 is printed in the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit in Appendix A at pages 1-a through 9-a, both inclusive)

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	FIFTH
COUNTY OF ROBERTS	)	JUDICIAL CIRCUIT

John Lee Feather,
Petitioner

vs

The State of South Dakota,
Respondent

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

There having been filed in this Court by John Lee Feather, the petitioner, a Petition for a post-conviction hearing and the States Attorney having duly answered as provided by law; the above entitled matter come on for hearing before the Court in the Courtroom, in the Courthouse, in the City of Sisseton, County of Roberts and State of South Dakota, on the 26th day of September, 1972; the petitioner appearing by his Attorney, L. R. Gustafson, and the State of South Dakota appearing by Wallace R. Brantseg, States Attorney of Roberts County, South Dakota; and the Court having heard and considered all of the evidence introduced by said petitioner and no evidence having been offered by the Respondent; and the Court being fully apprised in the premises, now makes and enters the following:

FINDINGS OF FACT

I

That the petitioner, John Lee Feather, is an unemancipated American Indian, being enrolled as a member of the Sisseton-Wahpeton Sioux Tribe.

II

That he is presently a prisoner, incarcerated in the State Penitentiary at Sioux Falls, under a Six (6) year sentence imposed on December 9, 1971, by the Honorable Sigurd, Anderson, Judge of the Circuit Court of the Fifth Judicial

Circuit of South Dakota, on a plea of guilty at Sisseton, Roberts County, South Dakota, to the charge of First Degree Robbery.

III

That the robbery was committed within the County of Roberts, State of South Dakota, within the exterior boundaries of the Sisseton-Wahpeton Reservation. That the particular land upon which the alleged crime was committed was not Indian trust land but was land that had been deeded to a non-Indian, still within the limits of the reservation.

IV

That the land upon which the robbery was committed was non-Indian, patented land, which the Sisseton-Wahpeton bands of the Dakota Sioux Indians had sold or relinquished to the United States under the terms of the agreement which was ratified by Congress in 1891.

V

That in sections surrounding this particular land upon which the robbery was committed there is land that remains unpatented Indian Land or Indian trust land within the Sisseton-Wahpeton Sioux Lake Traverse Reservation.

VI

That lots or tracts of non-Indian patented or deeded land and lots and tracts of unpatented Indian trust land are interspersed in a crazy-quilt pattern over the entire area within the boundaries of the said Reservation as by Treaty defined in 1867.

From the foregoing Findings of Fact, the Court now makes and enters the following:

CONCLUSIONS OF LAW

I

That the State Court had jurisdiction of the petitioner for this patented land was not within Indian country.

Let Judgment be entered accordingly.

Dated this 26th day of September, 1972.

BY THE COURT

ATTEST

Philo Hall
Judge of Circuit Court

(SEAL) Vivian Hove
Clerk

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF ROBERTS)

IN CIRCUIT COURT
FIFTH
JUDICIAL CIRCUIT

John Lee Feather,
Petitioner
vs
The State of South Dakota,
Respondent

JUDGMENT

The Petition of the above named petitioner having come on for hearing before the Court, in the Courtroom, in the Courthouse, in the City of Sisseton, County of Roberts and State of South Dakota, on the 26th day of September, 1972 before Honorable Philo Hall, Judge presiding, and the officers of the Court present; the petitioner appearing by his Attorney L. R. Gustafson, of Britton, South Dakota, and the Respondent appearing by Wallace R. Brantseg, the States Attorney in and for Roberts County, of Sisseton, South Dakota; the Court having heard and considered the Petitioner's Petition and being duly apprised in the premises, and having entered its Findings of Fact and Conclusions of Law, which are incorporated herein by reference thereto as if the same were herein re-stated, and being fully apprised in the premises, it is now therefore

ORDERED that the Petition of John Lee Feather be and the same is hereby denied.

Dated this 26th day of September, 1972.

BY THE COURT

ATTEST

Philo Hall
Judge of Circuit Court

(SEAL) Vivian Hove
Clerk

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF ROBERTS)

IN CIRCUIT COURT
FIFTH
JUDICIAL CIRCUIT

John Lee Feather,
Petitioner
vs
The State of South Dakota,
Respondent

DENIAL OF APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE FOR APPEAL

A final judgment having been entered by the undersigned Circuit Judge, denying petitioner's petition for relief under Chapter 23-52 of South Dakota Compiled Laws 1967, and application having been made for a certificate of probable cause, as provided in Section 23-52-16 South Dakota Compiled Laws 1967 as amended, and it appearing to the satisfaction of this Court that the sole issue involved has been decided by the United States Court of Appeals for the Eighth Circuit in the case of DeMarrias v. State of South Dakota, (319 F2d 845) (1963), based on interpretation of federal statutes and proclamations, United States treaties with the Sisseton-Wahpeton Bands of Sioux Indians and the intent of United States Congress, and there is not probable cause that an appealable issue exists for appeal to the South Dakota Supreme Court, the application for a certificate of probable cause, required for appeal to the Supreme Court of South Dakota under the terms of Section 23-52-16 South Dakota Compiled Laws 1967, is denied.

Dated this 27th day of September, 1972.

BY THE COURT

ATTEST

Philo Hall
Judge of Circuit Court

(SEAL) Vivian Hove
Clerk

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

John Lee Feather, Petitioner	)	ORDER DENYING CERTIFICATE OF PROBABLE CAUSE FOR APPEAL
vs.	)	
The State of South Dakota, Respondent	)	

Petitioner's application for a certificate of probable cause to appeal from a final judgment in the above entitled matter entered by the Honorable Philo Hall, one of the Judges of the Fifth Judicial Circuit of the State of South Dakota on September 27, 1972, in Roberts County, South Dakota, having been fully considered by all members of the Court and no probable cause that an appealable issue exists having been shown to the satisfaction of the Court.

IT IS ORDERED that Petitioner's application for a certificate of probable cause be and the same is hereby denied.

DATED at Pierre, South Dakota, this 20th day of October, 1972.

BY THE COURT:

Charles S. Hanson
Presiding Judge

ATTEST:

Lyman A. Melby Seal),
Clerk of the Supreme Court

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

FILED
November 20, 1972
William J. Srstka,
Clerk
By Judy L. Harvey,
Deputy

United States of America ex rel
John Lee Feather,
Plaintiff

vs

Don R. Erickson, Warden of the
South Dakota State Penitentiary,
Defendant

CIV 72-1030
PETITION

TO THE HONORABLE AXEL J. BECK, OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, NORTHERN DIVISION:

I

That your petitioner is now imprisoned and restrained of his liberty in the South Dakota State Penitentiary in the City of Sioux Falls, County of Minnehaha and State of South Dakota, in the custody of Don R. Erickson, Warden of said Penitentiary; that the said prison is a state prison of the State of South Dakota under the jurisdiction of the State of South Dakota and its officers.

II

That the cause or pretense of such imprisonment or restraint is that your petitioner on or about the 9th day of

December, 1971, was sentenced by the Honorable Sigurd Anderson, Judge presiding of the Fifth Judicial Circuit of Roberts County, South Dakota, for the crime of First Degree Robbery.

III

That the alleged crime was committed within the exterior boundaries of the Sisseton-Wahpeton Indian Reservation as was set apart for the tribe as a permanent reservation under the Treaty with the Sisseton-Wahpeton Bands of the Sioux Indians in 1867.

IV

That the land upon which the alleged crime was committed, which is one of the enumerated crimes pursuant to 18 U.S.C.A. 1153, was not Indian trust land that had been deeded to a non-Indian; that the land was still within the exterior boundaries of the Sisseton-Wahpeton Indian Reservation and within Indian country as defined by 18 U.S.C.A. 1151.

V

That your petitioner is an unemancipated American Indian, enrolled as a member of the Sisseton-Wahpeton Sioux Tribe.

VI

That your petitioner was sentenced by the Circuit Court Judge of Roberts County, South Dakota, for the alleged violation of a State offense for Six (6) years in the State Penitentiary and is presently serving the term as imposed.

VII

That the State of South Dakota had no jurisdiction over the Defendant, he being an Indian, where the alleged crime was committed within the Sisseton-Wahpeton Indian Reservation, even if the particular land had been deeded to a non-Indian prior to the alleged offense having been committed.

VIII

That the ground where the alleged offense was committed is within Indian country as defined by 18 U.S.C.A. 1151, and that the State had no jurisdiction of the petitioner thereon.

IX

That there was filed a Petition for Post-Conviction Hearing by the petitioner herein with the Circuit Court of Roberts County, South Dakota, and a hearing was had thereon on the 26th day of September, 1972, the Honorable Philo Hall, Judge presiding, and attached hereto is a copy of the Findings of Fact and Conclusions of Law dated the 26th day of September, 1972, together with a copy of the Judgment on the 26th day of September, and a copy of the Denial of Application for Certificate of Probable Cause for Appeal dated the 27th day of September, 1972, by Judge Hall.

X

Also attached hereto is a copy of the Order Denying Certificate of Probable Cause for Appeal as denied by all of the members of the South Dakota Supreme Court, signed by the presiding Judge, and dated the 20th day of October, 1972.

XI

That your petitioner has exhausted all of the state remedies at this time to the State of South Dakota and to all the Courts therein.

XII

That your petitioner being an enrolled member of the

Sisseton Sioux Tribe states that he is without funds, that he is indigent and unable to pay fees for the services of an attorney to represent him in the matters which he wishes to bring before this Court or pay for the filing of this writ.

XIII

That L. R. Gustafson, an Attorney at Law, of Britton, South Dakota, has represented your petitioner in the Post-Conviction hearings had in Roberts County, South Dakota.

XIV

That no previous application has been made for a Writ herein prayed for.

Wherefore your petitioner prays that this Court will appoint as counsel L. R. Gustafson, or another suitable counsel, for him and pay for said counsel as provided by the laws of the United States and pursuant to Order of the Court, and order this petition and subsequent proceedings without cost to petitioner, and to issue a Writ of Habeas Corpus addressed to Don R. Erickson, Warden of the South Dakota State Penitentiary, ordering and directing him to have the body of the petitioner forthwith before the Court, and at that time that the petitioner be discharged from further custody.

He further asks that the Court release him on his own recognizance pending the hearing on this petition and that the Court set a time and a place for the hearing on this petition and prescribe the notice to be given, and that the Plaintiff's conviction for First Degree Robbery be declared void and his sentence based thereon be set aside, and that he be released from all restraint imposed thereby, and for such other and further relief as may be deemed equitable and just.

John Lee Feather

State of South Dakota)
) SS
County of Minnehaha)

John Lee Feather being first duly sworn according to law, deposes and says that he is the Plaintiff and petitioner in the above and foregoing petition; that he has read the same, knows the contents thereof, and that the same is true and correct of his own knowledge, except as to those matters stated upon information and belief, as to which he believes it to be true.

John Lee Feather

Subscribed and sworn to before me this 15 day of November, 1972

(SEAL)

Richard D. Rist
South Dakota Notary Public

RICHARD D. RIST, Notary Public
My Commission Expires Aug. 4, 1979

IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of John Lee Feather — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 30th day of May, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of LaVerne Blackthunder — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 30th day of May, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of Ambrose St. John — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 30th day of May, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY — (SEAL OF COURT)
Deputy

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of James R. Keeble — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 30th day of May, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY — (SEAL OF COURT)
Deputy

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of Curtis Small — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 30th day of May, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of Roman V. Derby — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 30th day of May, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of Joseph Day — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 30th day of May, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of Arnold LaFramboise — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 10th day of July, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of Clarence Walker — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 10th day of July, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

In the Matter of the Writ of
Habeas Corpus of Theodore Duane Wynde — ORDER

Upon stipulation of L. R. Gustafson, Attorney for the Plaintiff herein, and the Attorney General's Office of the State of South Dakota, for the Defendant in the above entitled matter, that the factual situation is the same as the case entitled "United States of America ex rel Douglas Blacksmith, Plaintiff, vs. Don R. Erickson, Warden of the South Dakota State Penitentiary, Defendant"; that is, that the alleged crime was committed within the confines of the Sisseton-Wahpeton Indian Reservation but not upon trust land but that the alleged crime was committed on land on which the Federal Government had no longer a trust deed title thereto, and the Court being fully apprised in the premises, it is now therefore

ORDERED that the Writ of Habeas Corpus in the above entitled matter be and the same is hereby denied.

Dated this 10th day of July, 1973.

AXEL J. BECK
U. S. District Judge

ATTEST
WILLIAM J. SRSTKA
Clerk of U. S. District Court

JUDY L. HARVEY
Deputy

(SEAL OF COURT)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 73-1453 to 73-1459
and
Nos. 73-1541 to 73-1543

UNITED STATES OF AMERICA
ex rel. JOHN LEE FEATHER, et al,
Petitioners-Appellants,

vs.

DON R. ERICKSON, Warden
South Dakota State Penitentiary,
Defendant-Appellee.

PETITION FOR REHEARING

L. R. GUSTAFSON
Attorney at Law
Britton, South Dakota

Attorney for Petitioners-Appellants

KERMIT A. SANDE
Attorney General
State of South Dakota

WALTER W. ANDRE
Assisstant Attorney General

Attorneys for Defendant-Appellee

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 73-1453 to 73-1459
and
Nos. 73-1541 to 73-1543

UNITED STATES OF AMERICA
ex rel. JOHN LEE FEATHER, et al,
Petitioners-Appellants,

vs.

DON R. ERICKSON, Warden
South Dakota State Penitentiary,
Defendant-Appellee.

PETITION FOR REHEARING

Pursuant to Rule 35(a) and Rule 40 of the Federal Rules of Appellate Procedure, the Attorney General of South Dakota representing the Warden of the State Penitentiary petitions for a rehearing in Banc from the decision entered by this Court in the above entitled cases on December 7, 1973.

Rule 35(a) of the Federal Rules of Appellate Procedure provides that a majority of the Circuit Judges of this Court in regular active service may order that an appeal be reheard:

(1) When consideration by the full court is necessary to secure or maintain uniformity of its decisions, or

(2) When the proceeding involves a question of exceptional importance.

I. NECESSITY TO MAINTAIN UNIFORMITY OF DECISIONS

In 1967 in the case of Beardslee v. United States, 387 F. 2d 280, 287 (8th Cir.) Judge Blackmun, now a Justice of the United States Supreme Court, wrote:

Federal jurisdiction is not present, of course, even though

an Indian may be the defendant, where the offense site was never reservation land or is on a disestablished portion of a reservation, however that disestablishment may have been effected. This is the obvious inferential holding of **Seymour** and is the direct holding in the following cases, among others: De Marrias v. South Dakota, 319 F.2d 845 (8 Cir. 1963), affirming 206 F. Supp. 549 (D.S.D. 1962); Ellis v. Page, 351 F.2d 250 (10 Cir. 1965); Toosigah v. United States, 186 F.2d 93, 97-98 (10 Cir. 1950); Bird in the Ground v. District Court, 239 F.Supp. 981, 983-984 (D.Mont. 1965). See United States v. La Plant, 200 F. 92, 93 (D.S.D. 1911). The Supreme Court of South Dakota has so ruled repeatedly. State v. Sauter, 48 S.D. 409, 205 N.W. 25, 28 (1925); Application of De Marrias, 77 S.D. 294, 91 N.W. 2d 480 (1958); Sate ex rel. Hollow Horn Bear v. Jameson, 77 S.D. 527, 95 N.W. 2d 181 (1959); State v. De Marrias, 79 S.D. 1,107 N.W. 2d 255 (1961), cert. denied 368 U.S. 844, 82 S.Ct. 72, 7 L.Ed. 2d 42; Lafferty v. State ex rel. Jameson, 80 S.D. 411, 125 N.W. 2d 95 (1964); State v. Barnes, 81 S.D. 511, 137 N.W. 2d 683 (1965); State ex rel Swift v. Erickson, S.D., 141 N.W. 2d 1 (1966).

At 287 F. 2d 280, 287 Judge Blackmun concluded that:

> ***Seymour** and **Kills Plenty** are distinguishable because they do not apply the definition of Indian country contained in §1151(c). Clause (c) came into the statute as the result of the holding in United States v. Pelican, 232 U. S. 442, 34 S.Ct. 396, 58 L.Ed. 676 (1942), namely that lands allotted to Indians remained within the definition of Indian country even though the rest of the reservation was opened to settlement.See Reviser's Note following 18 U.S.C.A. §1151 (1966), and 80th Congress House Report No. 304. Clause (c) is an addition to and not a limitation upon the definition of Indian country embraced in the precedingportions of §1151. We regard clause (c) as applying to allotted Indian lands in territory now open and not as something which restricts the plain meaning of clause (a)'s phrase "notwithstanding the issuance of any patent". Although this result tends to produce some checkerboarding in non-reservation land, it is temporary and lasts only until the Indian title is extinguished. The congressional purpose and intent seem to be clear. See State ex rel. Hollow Horn Bear v. Jameson, supra, pp. 184-185 of 95 N.W. 2d.

Writing for the United States Court of Appeals for the Tenth Circuit, after he cited Toosigah v. United States (1950), 186 F.2d 93, Chief Judge Murrah also distinguished Seymour v. Superintendent, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed. 2d 346, and decided:

> The question is sharply drawn and simply put by the state as whether at the time of the alleged offense the Cheyenne and Arapahoe reservation had been disestablished and was non-existent. If not, exclusive jurisdiction was in the United States, the state court lacked jurisdiction, and the writ should issue. We agree with the state and trial courts.
>
> Toosigah v. United States, supra, involved an offense defined in §1153 on what was originally the duly established Comanche, Kiowa and Apache reservation. Conversely to our facts, the petitioner there had been charged, tried and convicted in the federal court. We issued the writ and discharged the petitioner because we were ultimately of the view that the reservation had been completely disestablished by the Treaty of October 21, 1892 (ratified June 6, 1900), 31 Stat. 676, by the terms of which the tribes occupying the reservation did "cede, convey, transfer, **relinguish** (sic) and surrender, forever and absolutely, without any reservation whatever, express or implied, all their claim, title, and interest, of every kind and character, in and to the lands embraced" within the reservation. Here the Cheyenne and Arapahoe Treaty of October, 1890 (ratified in 1891), 26 Stat. 1022, contains indistinguishably similar language, and the Toosigah case undoubtedly controls the jurisdictional question in this case unless it has been overruled sub silentio in Seymour v. Superintendent, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed. 2d 346. The petitioner relies on Seymour as applicable and controlling.
>
> ***The Comanche, Kiowa and Apache Treaty in Toosigah and the Cheyenne and Arapahoe Treaty involved here were negotiated treaties or agreements between the government and the Indian tribes by which in consideration of the payment of money and allotments in severalty the tribes did "cede, convey, transfer, relinquish and surrender, forever and absolutely, without any reservation", all their claim in and to the lands embraced within the designated reservation. While the words of alienation employed in the treaties do not formally disestablish the reservations, we think they have the unequivocal effect of doing so. In treaty parlance they are as appropriate to disestablish the reservations as the Congressional words "vacate and restore" employed in

> the 1892 Act to disestablish a portion of the Colville reservation. And, the critical language is textually and contextually different from that employed in the 1906 Act to authorize the Secretary of Interior to "sell or dispose of unallocated lands in the diminished Colville Indian reservation". It is one thing to open an Indian reservation to mineral exploitation, allotment to Indians, and non-Indian homesteaders by Congressional enactment as in Seymour. It is quite another to agree by treaty to cede and relinquish all claim, title and interest in the lands within the limits of a reservation.
>
> As part consideration for the "cession of territory and relinquishment of title, claim, and interest" in the lands within the reservation, the government paid the Indians $1,500,000, $1,000,000 of which was retained in the Treasury of the United States to the credit of the Indians. The $500,000 was to be distributed to the Indians for their immediate use and benefit. The treaty evinces a manifest purpose to dissolve tribal government and assimilate the Indian allottees in the community in which they lived as citizens and owners of land with a grubstake to enable them to compete on an equal footing with their non-Indian neighbors.

Elliss v. Page (1965), 351 F. 2d 250, 251, 252. Also see State of Wyoming v. Moss, 471 P. 2d 333 (1970).

II. QUESTIONS OF EXCEPTIONAL IMPORTANCE

The impact that the decision of this Court in the above entitled case will have on the non-Indian people who inhabit portions of the counties in South Dakota embraced by the Sisseton-Wahpeton (Lake Traverse) Reservation is illustrated by the following statistics:

County	Total Population	Indian Population
Marshall	5,965	138
Day	8,713	292
Grant	9,005	17
Roberts	11,678	1,567
Codington	19,140	73
TOTAL	54,501	2,087

Source: United States Census, 1970

The State of South Dakota respectfully requests this Court to grant this Petition for Rehearing and review the conflicting decisions in these difficult jurisdictional cases. De Marrias v. State of South Dakota (1962), 206 F. Supp. 549; De Marrias v. State of South Dakota (1963), 319 F. 2d 845; Ellis v. Page (1965), 351 F. 2d 250; Beardslee v. United States (1967), 387 F. 2d 280; and State of Wyoming v. Moss (1970), 471 P. 2d 333.

Dated at Pierre, South Dakota this 14 day of December, 1973.

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State of South Dakota

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State of South Dakota

Attorneys for Defendant-Appellee

CERTIFICATE OF SERVICE

I hereby certify that I served by mail two copies of this Petition for Rehearing upon L. R. Gustafson, Attorney at Law, Britton, South Dakota 57430, who represents the Petitioners-Appellants in the above entitled cases.

WALTER W. ANDRE
Assistant Attorney General
State Capitol Building
Pierre, South Dakota 57501

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

September Term, 1973

No. 73-1453. John Lee Feather, Appellant vs. Don R. Erickson, Warden, etc., Appellee.

No. 73-1454. LaVerne Blackthunder, Appellant vs. Don R. Erickson, Warden, etc., Appellee.

No. 73-1455. Ambrose St. John, Appellant vs. Don R. Erickson, Warden, etc., Appellee.

No. 73-1456. James R. Keeble, Appellant vs. Don R. Erickson, Warden, etc., Appellee.

No. 73-1457. Curtis Small, Appellant vs. Don R. Erickson, Warden, etc., Appellee.

No. 73-1458. Roman V. Derby, Appellant vs. Don R. Erickson, Warden, etc., Appellee.

No. 73-1459. Joseph Day, Appellant vs. Don R. Erickson, Warden, etc., Appellee.

No. 73-1541. United States of America , ex rel Arnold LaFromboise, Appellant vs. Don R. Erickson, Warden, etc., Appellee.

No. 73-1542. United States of America ex rel Clarence Walker, Appellant vs. Don R. Erickson, Warden, etc., Appellee.

No. 73-1543. United States of America, ex rel Theodore Duane Wynde, Appellant vs. Don R. Erickson, Warden, etc., Appellee.

Appeals from the United States District Court
for the District of South Dakota

The Court having considered petition for rehearing en banc filed by counsel for appellee and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

January 8, 1974